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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1940.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Facts

Petitioners' statement of the facts is substantially correct, but contains certain legal conclusions of petitioners and omits certain facts.

The facts set forth on pages 1 to 3 of the brief of respondent as petitioner in No. 656, October Term, 1940, are relevant here except that the gross receipts involved here were from respondent's customers located in Ohio, Michigan, Wisconsin and Illinois. Additional facts are:

Respondent by its own trucks transported the plain metal parts from such customers' factories to its factory, there enameled them, transported them by said trucks back to the customers' factories, had its enameling superintendent and other officials call on the customers at said factories from time to time in connection with the customers' enameling problems, carried on extensive communication with its customers by mail, telephone and telegraph, in connection with its business with such customers, and received by mail payments of the prices set forth in the purchase orders. (R. 21, 22.)

The Issue

Petitioners' statements of the issues (pp. 2 and 3 of their petition; p. 13 of their brief) are inaccurate. The issue is whether, because of the commerce clause of the Constitution, respondent's aforesaid receipts were not subject to the Indiana Gross Income Tax Act (Chapter 117 of the Indiana Acts of 1937, Sec. 64-2601 et seq. Burns' Ind. Stat. 1933, Pocket Supp. 1940). Said Act was before this court in *J. D. Adams Manufacturing Co. v. Storen*, 304 U. S. 307. Amendments adopted in 1937, except as indicated in the Company's brief in No. 656, October Term, 1940, are not involved.

B

Summary of Argument

1. Such receipts were from sales of goods and were non-taxable.

2. Such receipts, even if from services, were from interstate commerce. As applied thereto, the tax violates the commerce clause of the Constitution.

ARGUMENT

1.

For reasons discussed in the Company's brief in No. 656, October Term, 1940, respondent's receipts were from sales of goods and hence were non-taxable. *J. D. Adams Manufacturing Co. v. Storen,* 304 U. S. 307. Attention was called in such brief to relevant provisions of the Uniform Sales Act. That act was in force in each of the aforesaid states at all times in question. (Sec. 8381 et seq. Throckmorton's 1940 Annotated Code of Ohio; Sec. 9444 et seq. Michigan Compiled Laws of 1929; Sec. 121.01 et seq. Wisconsin Statutes 1939; Chap. 121a Illinois Revised Statutes, 1939.)

The language in the final paragraph of Part 1 of the argument in such brief was inadvertently disarranged. The following was intended: That the prices paid by the Company's customers reflected labor and other costs made the hard, finished enamel no less tangible personal property. The prices paid for the road machinery manufactured by J. D. Adams Manufacturing Co. doubtless reflected cost of material, labor and other costs, but the road machinery was nevertheless tangible personal property.

2.

Petitioners tacitly concede that if respondent's receipts were from interstate commerce, they were not subject to the tax, but contend that the receipts were from services which were solely intrastate in character. However, even if the receipts were from services, not from sales of goods, they were nevertheless from interstate commerce.

In *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 435-441, the state of Washington sought to collect a gross receipts tax upon appellant corporation's gross revenue from services rendered by the corporation as marketing agent for growers of apples and pears. Representatives of the corporation at various points outside Washington negotiated sales of the fruit on behalf of the corporation, executed contracts of sale, effected delivery of the shipments to the purchasers, and collected and remitted the purchase price. The corporation carried on extensive communication by telephone, telegraph and cable with its representatives outside Washington. The corporation's compensation for the entire service was at a stipulated rate per box of fruit sold. The entire services were held to be within the protection of the commerce clause. Said the Court (p. 438):

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume."

In the case at bar, respondent's traveling salesmen negotiated purchase orders from respondent's customers outside Indiana, respondent by its own trucks transported the plain metal parts to its factory, there enameled them, transported them by said trucks back to its customers' factories, had its enameling superintendent and other officials call on the customers at their factories from time to time in connection with the customers' enameling problems, and carried on extensive communication with its customers by mail, telephone and telegraph. Even if such activities be deemed the rendering of services, they nevertheless constituted interstate commerce, and were within the protection of the commerce clause.

In *Kansas City v. Seaman*, 99 Kans. 143, 160 Pac. 1139, 1140, 1141, L. R. A. 1917B, 341, a laundry corporation having its plant in Kansas City, Missouri, sent its wagons to gather up linen of patrons who lived across the state line in Kansas City, Kansas. The corporation hauled the linen back to the plant in Missouri and, after the linen had been laundered, delivered it to the patrons in Kansas and collected the charges therefor. The Court held that this was a service performed in interstate commerce and that therefore a Kansas City, Kansas, license tax upon each laundry operated within the city, the amount to be determined by the number of wagons employed, was inapplicable to said laundry corporation. The taxing authorities' contention that there was no commerce involved "because there was no barter or sale of personal property" and because the laundry company had "nothing but services to sell" was promptly rejected by the Court. The Court, citing *International Textbook Co. v. Pigg*, 217 U. S. 91, which involved interstate teaching by correspondence, ruled that "a sale of service involving transportation be-

tween the homes of the customers in Kansas and the place where the service was performed in Missouri" constituted interstate commerce. The further holding that the corporation was not carrying on a laundry business within Kansas City, Kansas, in no wise renders inapplicable the ruling with respect to interestate commerce.

In *National Labor Relations Board v. Hopwood Retinning Co.*, 98 F. (2d) 97, 99, 100, the retinning company's plant was in New York. The company's business consisted of straightening milk and ice cream containers, removing rust therefrom and retinning and resoldering them. Part of the company's business was with customers located outside New York. The company's trucks picked up from such customers the containers upon which work was to be done, transported them to the company's plant and, after completion of the work there, returned them to the customers. The company was held to be engaged in interstate commerce. Said the Court (pages 99, 100):

> "Hopwood contends that it is not engaged in interstate commerce . . . but merely performs a service. It refers to" various cases, "but these cases are not applicable. Hopwood's trucks picked up and made deliveries of containers upon which work was to be done and transported them . . . in interstate commerce. Its business consisted of straightening the containers, the removal of rust and solder and retinning and resoldering. New bottoms and other parts were also supplied, all of which was included in the service charge. . . . It was clearly engaged in interstate commerce."

Likewise, in *National Labor Relations Board v. Fashion Piece Dye Works*, 100 F. (2d) 304, 305, a company which operated a plant in Pennsylvania for dyeing and finishing

acetate goods belonging to customers outside that state with whom the company did most of its business and from and to whom the goods were transported by the company's truck, was held to be engaged in interstate commerce.

In *United States v. Spotless Dollar Cleaners,* 6 F. Supp. 725, 731, 732, clothing was collected in New York and conveyed to a dry cleaning plant in New Jersey and, after being cleaned, was returned to New York. This was held to constitute a service in interstate business. That the case arose under the National Industrial Recovery Act, subsequently held invalid by this Court, does not affect the soundness of the ruling with respect to the interstate character of the business.

In *People v. Vechione,* 276 N. Y. S. 705, 706, 707, clothing was collected in New York City, transported to New Jersey and, after being laundered, was returned to New York City. Laundry service between the states was held to constitute interstate commerce.

In the *Adams Manufacturing Co.* case, 304 U. S. 307, 311, the Court trenchantly pointed out that, as regards interstate commerce, the vice of the Indiana Gross Income Tax Act is "that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce," etc. That this holding applies fully to any "receipts derived from activities in interstate commerce," whether the subject matter of such activities be goods or services, is obvious not only from the Court's language, but also from the United States Supreme Court cases cited in notes 10 and 11 of the opinion. Note 10 relates to the following language (pages 311, 312):

> "We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution."

Of the twelve cases cited in note 10, nine involved services: broadcasting services, telephone services, personal services, etc. Of those nine decisions, eight invalidated the challenged tax as applied to services in interstate commerce. Clearly, the subject matter of activities in interstate commerce may be goods or services.

The tax in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, was of a wholly different character from the Indiana gross income tax, and, moreover, in that case all the events upon which the tax was conditioned occurred in New Mexico.

Petitioners argue here that all the events from which the tax arose occurred in Indiana, and assert that respondent's receipts were for the enameling, implying thereby that such receipts were solely for the manufacture in Indiana of the hard, finished enamel attached to the metal parts. This argument ignores the realities of the situation. That the customers were billed for the enameling was inserted in the stipulation of facts solely in order to show that the prices billed by respondent did not include the plain metal parts to which the enamel was attached. It is not true, and the stipulation does not mean, that the prices excluded any of the numerous activities which respondent carried on with the customers—negotiation of orders, communication by telephone and telegraph and correspondence, calls at the customers' factories, transportation by respondent's trucks of the metal parts from the customers' factories to

respondent's factory, the manufacture of the hard, finished enamel attached to the metal parts, and the return of the parts in respondent's trucks to the customers' factories. Even petitioners recognize (pp. 3 to 5, their petition) that all such activities were "steps in enameling process of respondent" (p. 3). Obviously, each such activity was a part of the services rendered by respondent, assuming, *arguendo,* that respondent merely rendered services, and of course each was reflected in the prices paid by the customers, just as the wages of the factory workers, the cost of materials, the salaries of executives and other costs of operation were reflected in such prices. That respondent did not charge separately for any such activity makes the cost thereof and the reflection of the cost in the price provided in a particular purchase order no less real.

Petitioners' statements (p. 11, their brief) that they do not tax gross receipts from interstate transportation and that "hence any such receipts would be eliminated before any assessment was made and before litigation was instituted" are wholly inaccurate with respect to the assessment here involved. Whatever may be petitioners' policy (as to which there was no evidence) concerning receipts from interstate transportation, actually, as the Circuit Court of Appeals pointed out and as respondent has stated, the assessment here covered receipts from all the aforesaid activities, including transportation. There was no apportionment whatever.

It is of course true that the manufacture of the hard, finished enamel attached to the metal parts occurred only in Indiana. However, most of, if not all, the aforesaid other activities inextricably connected therewith occurred outside Indiana. Similarly, in the *Adams Manufacturing*

Co. case the goods were manufactured in Indiana but other activities from which the taxed receipts arose occurred outside Indiana. Since the tax included in its measure, without apportionment, receipts derived from activities in interstate commerce, the entire tax fell.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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